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Supreme Court, U.S.
FILED

99 404 SEP 3 1999

No. _____ OFFICE OF THE CLERK

IN THE SUPREME COURT OF THE UNITED STATES COURT

October 1999

RODNEY FRANCIS WRIGHT,
Plaintiff-Appellant,
vs.
OREGON STATE BOARD OF
PAROLE-CHAIR,
Respondent-Appellee.

On Petition for a Writ of Certiorari to the United States Court Of Appeals for the Ninth Circuit

---

PETITION FOR A WRIT OF CERTIORARI

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26 pp

Question Presented

Is the ruling by the Ninth Circuit, affirming a decision by the District Court for the District of Oregon, contrary to established procedure and precedent, denying plaintiff due process of law and equal protection of the laws under the 5th and 14th Amendments of the United States Constitution?

List of Parties

All of the parties in the United States Court of Appeals for the Ninth Circuit are listed in the caption.

Table of Contents

QUESTION PRESENTED . . . i

LIST OF PARTIES ii

TABLE OF AUTHORITIES . . . iv

OPINIONS BELOW 1

JURISDICTION 1

CONSTITUTIONAL AND STATUTORY PROVISIONS 2

STATEMENT OF THE CASE . . . 6

REASON FOR GRANTING THE WRIT . 8

CONCLUSION 10

APPENDIX A:
Magistrate Judge's Recommendation and Finding, U. S. District Court, District of Oregon A-1

APPENDIX B:
District Judge's Opinion and Order, U.S. District Court, District of Oregon . B-1

APPENDIX C:
Order, U.S. Ninth Circuit of Appeals . C-1

TABLE OF AUTHORITIES

OREGON STATUTES CITED

Oregon Revised Statutes 163.375, 163.415, 163.465 and 163.425 7
Oregon Revised Statutes 138.510 to 138.610 . 9

FEDERAL STATUTES CITED

28 U.S.C. § 2244 7
28 U.S.C. § 1254(1) 1
28 U.S.C. 2241 6
USC § 2253 (c)(2) 8
28 U.S.C. 2254 8
Section 101 of AEDPA amended 28 U.S.C. Subsection 2244 7

CASES CITED

Calderon v. Central District of Cal., 112 F.3d 386 (9th Cir. 1997) . . . 8,9,10
Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L.Ed.2d 674 (1984) . . 10
State of Oregon v. Wright, 109 Or App 495, 820 P.2d 824 (1991) . . . 7,9,10
Lindh v. Murphy, 96 F.3d 856, 866 (7th Cir. 1996)
Reyes v. Keane, 90 F.3d 676, 679 (2d Cir. 1996) . 9
Landgraf v. USI Film Prods, 511 U.S. 244, 270,114 S.Ct. 1483, 1499 128 L.Ed.2d 229 (1994) . 9
Wright v. Baldwin, Court of Appeals #A77539 . 7,9
Wright v. Baldwin, Umatilla County Case #CV92-14 7,9
Multnomah County, State of Oregon, *State of Oregon vs. Rodney Francis Wright*, criminal case no. 891136121 7
Lonchar v. Thomas, 116 S.Ct. 1293, 1295, 134 L. Ed.2d 440 (1996) . . . 8
Kellotat v. Cupp, 719 F.2d 1027, 1030 (9th Cir. 1983) 8
Lerch v. Cupp, 9 Or.App 508, 496 P.2d 379, rev. denied (1972) 8
State v. Montgomery, 294 Or. 417, 657 P.2d 668 (1983) 8

CONSTITUTION CITED

The Fifth Amendment of the U.S. Constitution . 8,10

Section 10, Clause 1 of the United States Constitution 8,9

The Fourteenth Amendment, § 1, United States Constitution 8,10

PETITION FOR A WRIT OF CERTIORARI

Rodney Francis Wright, pro se plaintiff, respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

Nature of the Proceedings

This is an appeal from an order in case no. 99-35477 entered on June 18, 1999 by Judge Rymer and Silverman, Circuit Judges for the U.S. Court of Appeals for the Ninth Circuit. The relief sought is reversal of the Order and remand to the Ninth Appeal for further proceedings.

Nature of the Judgment

In the United States Court of Appeals for the Ninth Circuit, an order affirming a decision in case no. DC#CV-97-01098-DJH from the U.S. District Court for the District of Oregon. The opinion of the Court of Appeals is reported in Case No. 99-35477.

Jurisdiction

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

Effective Dates

The Opinion was entered on June 18, 1999. The petition for Certiorari was served and filed on September 1, 1999.

CONSTITUTIONAL AND STATUTORY PROVISIONS

1. The Fifth Amendment, United States Constitution, which provides: "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

2. The Fourteenth Amendment, § 1, United States Constitution, which provides: "All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

The statute under which petitioner sought post-conviction relief was 28 U.S.C. § 2254. *State custody; remedies in Federal* courts which provides as follows;

"(a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States."

"(b) An application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State, or that there is either an absence of available State Corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner."

"(c) An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented."

"(d) In any proceeding instituted in a Federal court by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination after a hearing on the merits of a factual issue, made by a State court of competent jurisdiction in a proceeding to which the applicant for the writ and the State or an officer or agent thereof were parties, evidenced by a written finding, written opinion, or other reliable and adequate written indicia, shall be presumed to be correct, unless the applicant shall establish or it shall otherwise appear, or the respondent shall admit –

(1) that the merits of the factual dispute were not resolved in the State court hearing;

(2) that the fact finding procedure employed by the State court was not adequate to afford a full and fair hearing;

(3) that the material facts were not adequately developed at the State court hearing;

(4) that the State court lacked jurisdiction of the subject matter or over the person of the applicant in the State court proceeding;

(5) that the applicant was an indigent and the State court, in deprivation of his constitutional right, failed to appoint counsel to represent him in the State court proceeding;

(6) that the applicant did not receive a full, fair, and adequate hearing in the State court proceeding; or that the applicant was otherwise denied due process of law in the State court proceeding;

(7) or unless that part of the record of the State court proceeding in which the determination of such factual issue was made, pertinent to determination of the sufficiency of the evidence to support such factual determination, is produced as

> provided for hereinafter, and the Federal court on a consideration of such part of the record as a whole concludes that such factual determination is not fairly supported by the record:
>
> And in an evidentiary hearing in the proceeding in the Federal court, when due proof of such factual determination has been made, unless the existence of one or more of the circumstances respectively set forth in paragraphs numbered (1) to (7), inclusive, is shown by the applicant, otherwise appears, or is admitted by the respondent, or unless the court concludes pursuant to the provisions of paragraph numbered (8) that the record in the State court proceeding, considered as a whole, does not fairly support such factual determination, the burden shall rest upon the applicant to establish by convincing evidence that the factual determination by the State court was erroneous."

"(e) If the applicant challenges the sufficiency of the evidence adduced in such State court proceeding to support the State court's determination of a factual issue made therein, the applicant, if able, shall produce that part of the record pertinent to a determination of the sufficiency of the evidence to support such determination. If the applicant, because of indigency or other reason, is unable to produce such part of the record, then the State shall produce such part of the record and the Federal court shall direct the State to do so by order directed to an appropriate State official. If the State cannot provide such pertinent part of the record, then the court shall determine under the existing facts and circumstances what weight shall be given to the State court's factual determination."

"(f) A copy of the official records of the State court, duly certified by the clerk of such court to be a true and correct copy of a finding, judicial opinion, or other reliable written in *dici* showing such a factual determination by the State court shall be admissible in the Federal court proceeding."

4. Section 101 of AEDPA amended 28 U.S.C. Subsection 2244 by adding following provision:

"(d)(1) A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of-

(A) the date of which the judgment became final by conclusion of direct review or the expiration of the time for seeking such review;

(B) the date on which the impediment to filing application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;

(C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or

(D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

(2) The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection."

5. Section 10, Clause 1 of the United States Constitution provides:

"No State shall enter into any Treaty, Alliance, or Confederation; grant Letters of Marque and Reprisal; coin Money, emit Bills of Credit; make any Thing but gold and silver Coin a Tender in Payment of Debts; pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts, or grant any Title of Nobility."

STATEMENT OF THE CASE

The facts necessary to place in their setting the questions now raised can be briefly stated:

A. *Course of proceedings in the Section 2254 case now before this Court.*

On 7/21/97, Petitioner filed the writ of habeas corpus pursuant to 28 U.S.C. 2254 challenging the fact of his convictions and sentences.

On 8/21/97, Petitioner amends petition for writ of habeas corpus.

On 3/25/98, Petitioner amends petition for writ of habeas corpus naming the appropriate Respondent.

On 11/2/98, Petitioner filed motion for Summary Judgment.

On 11/27/98, Respondent filed a Motion to Dismiss and Response to Summary Judgment.

On 2/25/99, Magistrate files Finding and Recommendation that Motion for Summary Judgment be denied; Motion to Dismiss granted; petitioner's second amended petition should be denied with prejudice.

On 3/8/99, Petitioner filed an objection to the Magistrate's Finding and Recommendation.

On 4/12/99, District Judge, after a de novo review, filed an opinion and order adopting Finding and Recommendation denying petitioner's Motion for Summary Judgment; granting the Parole Board's Motion to Dismiss; and denying petitioner's second amended petition, grounds one to nineteen.

On 4/15/99, District Judge filed ordered grounds twenty and twenty-one may be reasserted in 28 U.S.C. 2241.

On 4/27/99, Petitioner filed notice of appeal to the Ninth Circuit.

On 5/3/99, District Judge filed denial of certificate of appealability.

On 6/18/99, the U.S. Court of Appeals for the Ninth Circuit filed an order in case no. 99-35477 affirming the denial of certificate of appealability.

B. *Relevant facts concerning the underlying conviction.*

On 3/5/90, in a cause then pending in Multnomah County Criminal Court for the State of Oregon, entitled, State of Oregon vs. Rodney Francis Wright, criminal case no. 891136121, petitioner was found guilty by stipulated facts trial on an indictment of 12 counts charging violation of Oregon Revised Statutes 163.375, 163.415, 163.465 and 163.425.

On 6/14/90, Multnomah county judge entered judgment and petitioner was sentenced to a total of fourteen years imprisonment on six of ten consecutive counts, and was ordered to pay restitution of $3456.98. This judgment and sentence was affirmed by the Oregon Court of Appeals for Multnomah County Circuit Court, Wright v. State of Oregon, 109 Or App 495, 820 P.2d 824 (1991).

Petitioner brought unsuccessful post-conviction action challenging his conviction in Wright v. Baldwin, Umatilla County Case #CV92-14. That post-conviction case was affirmed by the Oregon Court of Appeals. Wright v. Baldwin, Court of Appeals #A77539. This case resolved between March 1, 1993 and December 1, 1993.

In this federal habeas proceeding, Petitioner's amended petition alleges grounds for relief ranging from trial court errors, ineffective assistance of counsel at the trial, appellate and post-conviction levels and claims against the Oregon Board of Parole and Post-Prison Supervision.

District Judge Haggerty stated in his opinion and order (doc #42) as follows: "As detailed in the Findings and Recommendation, petitioner's conviction dates back to 1990. Under the statutes of limitation for filing federal habeas petitions provided by the Anti-Terrorism and Effective Death Penalty Act ("AEDPA"), petitioner therefore had one year from enactment of the AEDPA to file his petition-that is, on or before April 23, 1997. 28 U.S.C. § 2244;

Calderon v. Central District of Cal., 112 F.3d 386 (9th Cir.), overruled on other grounds, 127 F.3d 782 (9th Cir. 1997). Thus, it was filed outside the time allotted by the Act." See Appendix A1-3

The Ninth circuit court denied the certificate of appealability and adopted the District Judge's certifying that petitioner has not made a substantial showing of the denial of a constitutional right pursuant to USC § 2253(c)(2) in a filed order in case no. 99-35477. See Appendix A4.

REASON FOR GRANTING THE WRIT

Review Is Warranted Because The Opinion By The Ninth Circuit Conflicts With The Opinions Of This Court And Those Of The Second, Seventh And Ninth Circuits Concerning Applying Penal Law Retroactively In Violation Of *Ex Post Facto* Clause Of The United States Constitution (Article 1, Section 9) And A Violation Of The Standard Of Care Through Due Process And Equal Protection Under The Law As Guaranteed By The Fifth And Fourteenth Amendment Of The United States Constitution.

The Court of Appeals and District Court have decided a federal question in a way in conflict with the applicable decisions of the Court.

Prior to Anti-Terrorism and Effective Death Penalty Act's (AEDPA) enactment, state prisoners had almost unfettered discretion in deciding when to file a federal habeas petition. The only pre-AEDPA time limit on filing habeas petitions was imposed by Rule 9(a) of the Rules Governing Section 2254 cases in the United States District Court. Even delays of more than a decade did not necessarily bar a prisoner from seeking relief. Lonchar v. Thomas, 116 S.Ct. 1293, 1295, 134 L.Ed.2d 440 (1996).

"Oregon provides two distinct avenues for review of alleged errors, including constitutional violations." Kellotat v. Cupp, 719 F.2d 1027, 1030 (9th Cir. 1983) Those claims can only be brought in either direct appeal or post-conviction proceedings.

First, "most trial errors must be raised by direct appeal to the Oregon Court of Appeals." Kellotat, 719 F.2d 1030; citing Lerch v. Cupp, 9 Or.App 508, 496 P.2d 379, rev. denied (1972); see State of Oregon v. Montgomery, 294 Or. 417, 657 P.2d 668(1983).

On the other hand, for violations of a defendant's rights that occur after trial, or that require a further evidentiary hearing for their determination, Oregon provides a statutory remedy in its trial courts by way of the Oregon Post-Conviction Hearing Act, Oregon Revised Statutes 138.510 to 138.610(1981)

Petitioner was convicted in Multnomah County case # 8911-36121. Petitioner's unsuccessful direct appeal of his conviction was concluded on November 13, 1991. State of Oregon v. Wright, 109 Or App 495, 820 P.2d 824 (1991).

Petitioner's post-conviction action challenging his conviction in Wright v. Baldwin, Umatilla County Case #CV92-14 was unsuccessful. This decision was subsequently affirmed by the Oregon Court of Appeals between May and December 1, 1993, Wright v. Baldwin, Court of Appeals #A77539.

Applying the AEDPA's time limitation period of one year to petitioner's case retroactively is impermissible and thus attaches new legal consequences to events completed before its enactment date of April 24, 1996. Landgraf v. USI Film Prods, 511 U.S. 244, 270, 114 S.Ct. 1483, 1499 128 L.Ed.2d 229 (1994)

In Calderon v. Central District of Cal., 112 F.3d 386 (9th Cir. 1997), the Ninth Circuit concluded, along with the Second and Seventh Circuits, that AEDPA one-year time limit did not begin to run against any state prisoner prior to the statute's date of enactment. In Reyes v. Keane, 90 F.3d 676, 679 (2d Cir. 1996) the Second Circuit stated that allowing AEDPA's time limit to run from dates prior to enactment "would be entirely unfair and a severe instance of retroactivity." In Lindh v. Murphy, 96 F.3d 856, 866 (7th Cir. 1996), the Seventh Circuit treated a reduction in the statute of limitations as a rule for new cases only. Therefore, petitioner contends that the Ex Post Facto Clause of the United States Constitution (Article 1 section 9) flatly prohibits retroactive application of penal legislation. Clearly, petitioner's direct appeal and post-conviction proceedings, completed before December 1, 1993, were done before the AEDPA statute enactment date of April 26, 1996.

Conclusion

Since petitioner's legal ordeal began, petitioner has never received the constitutionally guaranteed right of due process and equal protection under the law in state or federal courts. At the state level, properly filed motions of Suppression, Discovery and *In Limine*, were never ruled upon by the trial court judge as evident in the record of the trial court. In addition, petitioner's court appointed trial attorney failed to make any contemporaneous objection to this blatant oversight of the court in which the motions were filed. Since petitioner's trial counsel failed to object under Oregon law, the contemporaneous objection rule served strong state interests in the finality of its criminal litigation.

When petitioner directed his appellate attorney to raise these issues upon direct appeal, the appellate attorney felt no constitutional, ethical or professional motivation to address these discrepancies as meritorious issues and failed to do so. Instead, the appellate attorney raised four different issues, which were summarily rejected for review by the Oregon Court of Appeals. State of Oregon v. Wright, 109 Or App 495, 820 P.2d 824 (1991) Petitioner's post-conviction attorneys, though not constitutionally-bound to effectiveness standards, as stated in Strickland v. Washington, were equally unproductive through their inadequate consideration of the above-mentioned motions. Therefore, after continuously receiving ineffective and inadequate representation by petitioner's court-appointed attorneys at the Oregon State level, petitioner felt compelled to represent himself in the Federal court system. Unfortunately, the Federal court system continued to make decisions in stark contrast to the United States Constitution and in contradiction to their own previous ruling, as cited in Calderon v. Central District of Cal., 112 F.3d 386 (9th Cir. 1997). Petitioner was able to determine that the Anti-Terrorism and Effective Death Penalty Act (AEDPA) did not apply to petitioner's cause.

Therefore, the judgments rendered are unique and adulterated departures from decisions of this Court, which flatly prohibits the retroactive application of penal legislation. As such, the decisions by the lower courts, represents a misapplication of the Anti-Terrorism and Effective Death Penalty Act and a breach in the wall erected by the Fifth and Fourteenth Amendments to the Constitution and this Court. This petition for writ of certiorari should therefore be granted.

Respectfully submitted under the penalty of perjury.

Dated this 1st day of September, 1999.

Rodney Wright

Rodney Wright
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Portland, Or. 97294-0891

APPENDIX

APPENDIX A

FILE STAMPED
DISTRICT COURT OF OREGON
February 25, 1999
at Portland
K.W.
Clerk, U.S. District Court

UNITED STATES DISTRICT COURT
DISTRICT OF OREGON
AT PORTLAND
CIVIL NO. 97-1098-HU

RODNEY WRIGHT,

PETITIONER,

v.

CHAIR OF THE OREGON BOARD OF PAROLE AND POST-PRISON SUPERVISION.

RESPONDENT.

FINDING AND RECOMMENDATION

HUBEL, Magistrate Judge.

Petitioner filed a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. In his second amended petition [attached to petitioner's motion for temporary restraining order (#10)], petitioner seeks to challenge the constitutionality of a 1990 conviction and sentence(s) on several charges.

Respondent moved to dismiss the second amended petition on the basis that it was not filed within the one-year limitation period prescribed by 28 U.S.C. § 2244. Motion to Dismiss (#24). In response, petitioner contended that he had a properly filed state petition for writ of habeas corpus pending until July 23, 1996, and as such the limitations period was tolled, and did not run until July 23, 1997.[1] Objection to Motion to Dismiss (#25) p. 4.

[1] Petitioner's original petition in this action was filed on July 21, 1997.

28 U.S.C. § 2244(d)(2) provides that the "time during which a properly filed application for State Post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation" under 28 U.S.C. § 2244(d).

By Order (#20) entered August 13, 1998, the court held that is could not "ascertain whether petitioner's state petition for writ of habeas corpus, which was finally determined on July 23, 1996, was a 'properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim' such that the time during which it was pending'shall not be counted toward any period of limitation under this subsection.'" Order (#20) p. 2-3 (quoting 28 U.S.C. § 2244). The parties were requested to submit further evidence and argument on this issue.

Petitioner filed a Response to Court Order (#27) and a Motion for Summary Judgment (#31). Respondent filed a Response (#35) to the court order and to petitioner's motion for summary judgment and exhibits (#36) consisting of the pertinent documents from the state habeas corpus proceeding which petitioner claims tolled the limitations period applicable to his federal petition. Respondent contends that the state habeas action petitioner filed was not a "properly filed application... for collateral review." Response (#35) p.2

Based on the entire record before the court, find as follows.

In his second amended petition, petitioner challenges the constitutionality of a number of 1990 Multnomah County convictions and sentences for sexual offenses. Petitioner alleges nineteen grounds for relief challenging the convictions and sentences. In addition, in Grounds Twenty and Twenty-one petitioner alleges claims apparently pertaining to the conditions of his parole and post-prison supervision. See (Second) Amended Petition p. 5-6; Addendum to Amended Petition p. 4-9.

Petitioner's claim that he is "being denied the right to worship, congregate and or associate with those of like beliefs" and that the Oregon Board of Parole and Post-prison Supervision "routinely violates his due process rights by acting in a judicial fashion" are claims that relate to the execution of petitioner's sentence and are therefore properly brought under 28 U.S.C. § 2241.

The limitations period prescribed by 28 U.S.C. §2244 does not, by it's terms, apply to claims under 28 U.S.C. §2241. However, the § 2241 claims relating to the execution of petitioner's sentence are improperly joined to petitioner's §2254 claims challenging the fact of his convictions and sentences.

Even if Grounds Twenty and Twenty-one were properly part of the petition in this case, they should be dismissed for two other reasons.

Petitioner's state habeas proceeding did not contain any claims about the Parole Board. Respondent's Exhibit (#36) Exhibit 105. Therefore, there was no "properly filed application for ... other collateral review' with respect to Grounds Twenty and Twenty-one pending at any time after the effective date of the AEDPA. Thus, any applicable limitations period was not tolled as to those grounds.

In addition, petitioner's state proceedings did not involve any claims about the parole board. Thus, petitioner has procedurally defaulted as to those claims because he has not presented them to the state's highest court for review. See, Keeney v. Tamayo-Reyes, 112 S.Ct. 1715 (1992).

Accordingly, petitioner's claims alleged in Grounds Twenty and Twenty-one should be denied without prejudice to bring such claims in a separate proceeding pursuant to 28 U.S.C. § 2241.

The remaining issue before the court is whether plaintiff's § 2254 claims are barred by the one year statute of limitations on such claims prescribed by the provisions of the AEDPA. As discussed above and in the court's previous order, the determination of that issue hinges on the question of whether petitioner had a "properly filed application for State post-conviction or other collateral review" pending that would toll the limitations period.

Petitioner argues that his state habeas proceeding, ultimately concluded on July 23, 1996, constituted a state proceeding that tolled the limitations period under § 2244(d). Respondent argues that "the state habeas case does not alter the argument that petitioner did not timely file his federal habeas proceeding." Response (#35) p. 1.

Oregon provides two avenues for review of alleged errors, including constitutional violations, in criminal proceedings. Kellotat v. Cupp, 719 F.2d 1027, 1030 (9th Cir. 1983). Most trial errors must be raised by direct appeal to the Oregon Court of Appeals. Id., citing Lerch v. Cupp, 9 Or. App. 508, 496 P.2d 379, rev. denied (1972); see also, State v. Montgomery, 294 Or. 417, 657 P.2d 668 (1983). For violations that occur after trial, or that require a further evidentiary hearing for their determination, Oregon provides a statutory remedy in its trial courts by way of the Oregon Post-Conviction Hearing Act. O.R.S. §§138.510 to 138.610 (1981). Alleged ineffective assistance of counsel is properly asserted as a post-conviction claim. Kellotat, supra, 719 F.2d at 1030.

A state habeas corpus proceeding is not a proper method to attack a criminal conviction. O.R.S. 34.330 (2) (persons not allowed to prosecute the writ include "persons imprisoned or restrained by virtue of the judgment or decree of a competent tribunal of civil or criminal jurisdiction, or by virtue of an execution issued upon such judgment or decree"); see also, Billings v. Mass, 86 Or App 66, 738 P.2d 222 (1987) (state habeas not a substitute for direct appeal) and Mueller v. Benning, 314 Or 615, 841 P.2d 640 (1992) and Mora v. Mass, 120 Or App 173 (1993), *affirmed* 319 Or 570, 877 P2d 641 (1994) (state habeas not a substitute for post-conviction). A writ of habeas corpus is proper only when a petitioner asserts grounds other than the unlawfulness of a judgment, the proceedings upon which the judgment is based, or the appellate review thereof. O.R.S. 138.540(2).

In allowing the state's motion to dismiss petitioner's state proceeding, Umatilla County Circuit Court Judge Jack Olsen stated: "Okay. Well, with all due respect to your client, Toni, this is not habeas corpus, it's either direct appeal or post conviction relief, are his remedies, but not habeas. The motion to dismiss is allowed." Respondent's Exhibits (#36) Exhibit 109 p.5.

Based on all of the foregoing, I find that there was no "properly filed application for State post-conviction or other collateral review" pending on April 24, 1996, the effective date of the Anti-Terrorism and Effective Death Penalty Act. Therefore, petitioner had until April 23, 1997 to file his federal habeas petition. Calderon v. Central District of California, 112 F.3d 386 (9th Cir. 1997) and Calderon v. Central District of California, 127 F.3d 782 (9th Cir. 1997).

Petitioner did not file the federal habeas petition in this proceeding until July 21, 1997. The petition is time barred and should be denied.

Based on all of the foregoing, respondent's Motion to Dismiss (#24) should be allowed. Petitioner's Motion for Summary Judgment (#31) should be denied. Petitioner's Second Amended Petition should be denied with prejudice. Petitioner may bring the claims alleged in Grounds Twenty and Twenty-one in a petition under 28 U.S.C. § 2241. This proceeding should be dismissed.

SCHEDULING ORDER

The above Finding and Recommendation will be referred to a district judge for review. Objections to these Findings and Recommendations are waived unless written objections are filed according to the schedule below. 28 U.S.C. §§ 636(b)(1)(B) and (C); FRCP 72.

March 15, 1999: Due date for filing objections. If no objections are filed, the Findings and Recommendation will go under advisement on that date.

March 29, 1999: Due date for filing responses to objections. If objections are filed, the Findings and Recommendation will go under advisement on that date or when responses are filed, whichever is earlier.

ENTERED FOR THE COURT:

/s/Dennis James Hubel
United States Magistrate Judge

APPENDIX B

FILE STAMPED
DISTRICT COURT OF OREGON
APRIL 12, 1999
at Portland
K.Wight
Clerk, U.S. District Court

UNITED STATES DISTRICT COURT
DISTRICT OF OREGON
AT PORTLAND
CIVIL NO. 97-1098-HU

RODNEY WRIGHT,

PETITIONER

v.

CHAIR OF THE OREGON BOARD OF PAROLE AND POST-PRISON SUPERVISION,

RESPONDENT

OPINION AND ORDER

Presently before the court is petitioner's objection to Magistrate Judge Hubel's Finding and Recommendation filed on February 25, 1999. The court, after conducting a de novo review of the Findings and Recommendation, the parties' pleadings, the relevant law, and the record herein[1], shall adopt the Findings and Recommendation and grant the respondent's motion to dismiss the second amended petition for habeas corpus.

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[1] When a party objects to any portion of a magistrate judge's report, the district judge must make a de novo determination of that portion of the report. 28 U.S.C. §636(b)(1)(B); McDonell Douglass Corp. v. Commodore Business Machines, 656 F.2d 1309, 1313 (9th Cir. 1981), cert denied 445 U.S. 920 (1982). The district judge may receive further evidence, recommit the matter with instructions, or accept, reject, or modify the report, in whole or in part. Id

As detailed in the Findings and Recommendation, petitioner's conviction dates back to 1990. Under the statutes of limitations for filing federal habeas petitions provided by the Anti-Terrorism and Effective Death Penalty Act("AEDPA"), petitioner therefore had one year from enactment of the AEDPA to file his petition-that is, on or before April 23, 1997. 28 U.S.C. § 2244; Calderon v. Central District of Cal., 112 F.3d 386 (9th Cir.), overruled on other grounds, 127 F.3d 782 (9th Cir. 1997). The court's record reveal the petition was not filed until July 23, 1997. Thus, it was filed outside the time allotted by the Act.

Furthermore, it is irrelevant that plaintiff filed for habeas corpus in Oregon state court, because such a petition is not a proper vehicle for challenging a conviction in Oregon. (See Findings and Recommendation at 5-7) Thus, the filing of the state habeas petition did not alter the date upon which the federal statute of limitation began to run. (Id.) Finally, as described in the Findings and Recommendations, grounds twenty and twenty-one of the petition allege claims pertaining to the conditions of petitioner's parole and post-prison supervision, which are not properly joined to a petition filed under 28 U.S.C.§ 2254. As these claims are not properly before the court, they shall be dismissed without prejudice to petitioner's reasserting them in a petition under 28 U.S.C. § 2241.

Therefore, it is hereby ordered:

1. The Magistrate Judge's Finding and Recommendation (doc.38) is adopted.
2. Respondent's motion to dismiss, (doc.24), is granted.
3. Petitioners' motion for summary judgment, (doc.31) is granted.
4. The second amended petition for habeas corpus, (attached to doc. 10), is denied. Grounds twenty and twenty-one may be reasserted in a petition under 28 U.S.C. §2241.
5. Petitioner's objection, (doc.39), is denied.

ENTERED FOR THE COURT:

/s/ Ancer L. Haggerty

United States District Judge

APPENDIX C

FILE STAMPED
U.S. COURT OF APPEALS
JUNE 18, 1999
Cathy A. Catterson,
Clerk, U.S. Court of Appeals

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT
NO. 99-35477
DC#CV-97-01098-DJH
OREGON (PORTLAND)

RODNEY FRANCIS WRIGHT,
PETITIONER-APPELLANT,

v.

OREGON STATE BOARD
OF PAROLE,
RESPONDENT-APPELLEE.

ORDER

Before: RYMER and SILVERMAN, Circuit Judges.

The request for a certificate of appealability is denied. See 28 U.S.C. § 2253 (c)(2).